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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO GAMBOA,

Defendant and Appellant.

E063994

(Super.Ct.No. FVA1400803)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed.

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

In October 2003 defendant and appellant Ernesto Gamboa was convicted of attempted grand theft, a felony. (Pen. Code, §§ 664, 487.)¹ On or about May 15, 2014, defendant possessed a firearm and ammunition. On May 19, 2014, defendant was charged with (1) multiple counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and (2) one count of being a felon in possession of ammunition (§ 30305, subd. (a)(1)). Proposition 47 was passed by the voters in November 2014, and in February 2015, defendant's 2003 felony attempted grand theft conviction was reduced to a misdemeanor pursuant to Proposition 47 (§ 1170.18; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308 [Prop. 47 was passed on Nov. 4, 2014]).

In July 2015, defendant pled no contest to (1) one count of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and (2) one count of being a felon in possession of ammunition (§ 30305, subd. (a)(1)). The trial court suspended execution of defendant's prison sentence and granted defendant 36 months of supervised probation with the condition he serve 180 days in the county jail. Defendant obtained a certificate of probable cause in order to bring this appeal.

Defendant raises three issues on appeal. First, defendant contends his 2015 convictions should be vacated because there was not a valid underlying felony conviction when he entered his pleas in July 2015. Second, defendant asserts that people who have had their felony convictions transmuted into misdemeanor convictions pursuant to Proposition 47 (§ 1170.18) are permitted to possess firearms and

¹ All subsequent statutory references will be to the Penal Code unless indicated.

ammunition. Alternatively, defendant asserts that people who have had their felony convictions transmuted into misdemeanor convictions pursuant to Proposition 47 (§ 1170.18) are permitted to possess ammunition. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Defendant's trial counsel stipulated to the police reports and preliminary hearing transcript forming the factual basis for defendant's plea. A police report reflects that on May 15, 2014, at defendant's residence, a Fontana police officer found seven rifles, two handguns, one shotgun, 11 high capacity magazines, and approximately 1,000 rounds of live ammunition. The ammunition included: 7.62 and nine-millimeter; .45, .38, .50, 30-306, .30, .35, .25, and .22-caliber; and 12-gauge.

DISCUSSION

Defendant contends his convictions should be vacated because there was not an underlying felony conviction when he entered his pleas in July 2015.

We apply the de novo standard of review because this is a predominately legal issue. (*People v. James* (1998) 62 Cal.App.4th 244, 259.) The status of defendant as a former felon is an element that must be proven for the crime of being a felon in possession of a firearm. (*People v. Baird* (1995) 12 Cal.4th 126, 129.) The crime of being a felon in possession of a firearm "is committed the instant the felon in any way has a firearm within his control." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410, italics omitted.)

Thus, the question is whether defendant was a felon in May 2014 when he possessed the firearms and ammunition. (See *In re E.J.* (2010) 47 Cal.4th 1258, 1277 [defendant's status as a felon caused the prohibition to apply to him].) The record reflects defendant was a felon in May 2014. As such, defendant committed the offenses of being a felon in possession of a firearm and ammunition. The fact that months later defendant's felony was transmuted to a misdemeanor does not alter the fact that in May 2014 he was a felon in possession of a firearm and ammunition. As such, defendant's convictions must be affirmed.

Defendant contends his convictions should be vacated because when he entered his no contest plea in July 2015 his prior felony conviction had been transmuted into a misdemeanor and thus there was no underlying felony. Defendant provides no authority for the date of the plea being the relevant date for assessing defendant's status as a felon in relation to possessing the firearm and ammunition. Defendant does not explain the legal implications of using defendant's July 2015 felon status in relation to the firearm and ammunition possessed in May 2014. It would seemingly violate defendant's rights to find he possessed a firearm and ammunition in May 2014 and then use his felon status in July 2015 to determine a crime was committed in May 2014.

For example, if a defendant were intoxicated on Wednesday but drove sober on Saturday, we would not look to his state of intoxication on Wednesday to assess whether a crime occurred when he drove on Saturday. (See § 20 [union of act and intent].) Similarly, if a defendant molested a 12-year-old child, but went to trial years

later when the victim was 16 years old, for purposes of the crime the victim was under the age of 14 years—we would not use the victim’s age at the time of trial. (See *People v. Mejia* (2007) 155 Cal.App.4th 86, 97 [“section 288, subdivision (c)(1), which requires that the victim be 14 or 15 years old at the time of the offense”].) As such, we find defendant’s use of the July 2015 date to be unpersuasive.

Next, defendant contends people, such as defendant, whose felony convictions have been transmuted into misdemeanor convictions are not prohibited from possessing firearms or ammunition. As explained *ante*, when defendant possessed the firearm and ammunition in May 2014, which was prior to the passage of Proposition 47, he was a felon. (See *People v. Shabazz, supra*, 237 Cal.App.4th at p. 308 [Prop. 47 was passed on Nov. 4, 2014].) Accordingly, any discussion about the firearm and ammunition rights of people who have had their felonies reduced to misdemeanors is not relevant to resolving this case and would be merely an academic discussion. We do not engage in abstract academic discussions when resolving cases, and therefore do not further discuss this issue. (*In re Marquis H.* (2013) 212 Cal.App.4th 718, 724 [purely academic questions are dismissed as moot].)²

² Defendant requests this court take judicial notice of the minutes from his 2003 attempted grand theft case. In particular, defendant requests this court take judicial notice of the fact that defendant had “completely served his felony sentence” prior to February 2015. We take judicial notice of the existence of the 2003 court minutes. (*People v. Hernandez* (2011) 51 Cal.4th 733, 741, fn. 3 [courts can take judicial notice of the existence of documents]; Evid. Code, §§ 452, subd. (d), 453.) We do not take judicial notice of the completion of defendant’s sentence in 2015 because the 2003 minutes reflect defendant was granted 36 months of probation, not that he completed his sentence.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.